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No. 96-850

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

City of St. Petersburg, Florida
Petitioner,

v.

WILLIAM A. BOWEN, as Trustee of
the William A. Bowen Trust Agreement,
Respondent.

On Petition for a Writ of Certiorari
to the District Court Of Appeal of Florida
Second District

AMICUS CURIAE BRIEF OF THE STATE OF FLORIDA

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INTEREST OF AMICUS CURIAE

The nuisance abatement proceedings conducted by the City of St. Petersburg's Nuisance Abatement Board were authorized by state law. Section 893.138, Florida Statutes (1995), provides that "any place or premises" may be declared a public nuisance if found to be the site of, *inter alia*, the unlawful sale or delivery of any controlled substance "on more than two occasions, within a 6-month period." The statute authorizes the creation of county or municipal boards to abate such nuisances and expressly provides that a board may order the place or premises closed for up to one year. It also provides for written notice to the owner and an opportunity for the owner to present evidence in his defense. *Id.*

As the petition for certiorari shows, many other states have laws similar to Florida's. (Pet. p.9, nn. 2,3) Historically, such laws have permitted state and local governments to abate a variety of nuisances--ranging from criminal activity to inappropriate land uses--in a variety of ways. Today, they are one means by which local governments can combat drug dealing by denying a safe and convenient place for such transactions. As a result of the decision of the Court of Appeal, however, Florida has now lost that weapon.

The decision in this case is a glaring anomaly in Fifth Amendment jurisprudence that portends only further confusion about what is a "taking" in Florida, and likely other, states. This Court is respectfully asked to grant a writ of certiorari to the Second District Court of Appeal.

SUMMARY OF ARGUMENT

The ruling of the Second District Court of Appeal in this case effectively holds that the temporary closure of any premises known to be the site of illicit drug activity within the ambit of the statute constitutes a taking that, under the Constitution, entitles the owner of the premises to compensation. In so ruling, the Court

of Appeal mistakenly treated the issue simply as one of land use regulation and relied exclusively on land use regulation cases, counting for nothing the ongoing criminal transactions at the Lorraine Apartments.

Government power to combat the pervasive scourge of drug dealing should not be confused with the more circumscribed and distinct limits on the power to regulate land development. The criminal use of property differs significantly from proposed development uses that may be inconvenient or undesirable to the community, and so do the constitutional constraints. The power to abate nuisances carries with it the power to prohibit the use of property for a reasonable period of time to ensure that nuisance activities are effectively stopped. Where government orders that property be temporarily closed to better effectuate abatement of a nuisance, there is no unconstitutional taking of the property.

ARGUMENT

I. The Decision of the District Court of Appeal Conflicts with Decisions of this Court Construing the Takings Clause and Completely Fails to Recognize the Authority of Government to Take Action that Will Effectively Deter the Criminal Use of Property.

Respondent's theory, adopted by the Court of Appeal, was that the mere demonstration of a temporary suspension of his right to lease his apartment units was sufficient to establish a violation of the Fifth Amendment Takings Clause, irrespective of the use to which that property was being put. This theory is flatly inconsistent with even a common sense understanding of government's responsibility to abate public nuisances, and it is contrary to the decisions of this Court.

This Court's most recent decisions construing the Takings Clause may refine, but certainly do not abandon, its many rulings that a state may, without paying compensation, prohibit the use of

property for purposes that amount to a public nuisance. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022, 1027-1029 (1992). *Lucas* instructs that in the context of land use regulation no compensation is due where inquiry shows "that the proscribed use interests were not part of [the owner's] title to begin with." 505 U.S. at 1027. Local government can permissibly prohibit whatever the State could "under its complementary power to abate nuisances that affect the public generally...." *Id.* at 1029. With particular relevance to this case, *Lucas* went on to state that, in the context of prohibiting nuisance uses of land, "[s]uch regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles" *Id.* at 1029-1030.

The petition for certiorari clearly demonstrates that Florida law has historically considered the use of property for illicit activities such as prostitution, gambling or drug dealing to be a public nuisance subject to abatement. The respondent here had no expectation at any time that under Florida law his apartment building could be used for repeated illegal drug transactions.

Nevertheless, the Court of Appeal concluded that the nuisance abatement board could do no more than order cessation of drug transactions and not closure of the property, because the latter action deprived the owner of all economically productive use of the apartment building. Neither *Lucas* nor any other precedent of this Court commands that result. To the contrary, this Court has repeatedly recognized that compensation is not required for every exercise of power that may entail the loss or destruction of property. In some circumstances, government may order the outright destruction of property without payment of compensation.[1] In others, the prohibition of offensive uses would

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[1] *Miller v. Schoene*, 276 U.S. 272 (1928) (destruction of healthy cedar trees

undoubtedly mean that, at least temporarily, the property could be put to no productive use, but that temporary loss of productive use does not mandate compensation.[2] *Lucas* did not abolish the government's right to abate activities that are either criminal or otherwise so offensive as to warrant no constitutional protection. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1182-83 (Fed. Cir. 1994). There is no right to use property for such purposes and hence no right to compensation when such activities are abated.

In this case, as a result of repeated criminal drug transactions occurring at the Lorraine Apartments, the premises were closed for one year. The fact that government may order property closed for a period of time to better effectuate abatement of a nuisance does not constitute a taking. Courts agree that such action simply constitutes "an appropriate means of definitely and completely ending the nuisance." *State ex rel. Haas v. Club Recreation and Pleasure*, 41 Or. App. 557, 599 P.2d 1194 (Or. App. 1979) (quoting *People ex rel. Lemon v. Elmore*, 256 N.Y.489, 177 N. E. 14, 16 (1931)). *See also State v. Dizzy Duck*, 203 Mich. App. 250, 511 N.W. 2d 907, 912 (Mich. App. 1994) ("It is within the discretion of the circuit court to choose a remedy less drastic than padlocking the building...").

This Court, in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), upheld against a First Amendment challenge the closure for a period of one year of the premises of an "adult" bookstore which had been declared a nuisance because of repeated illicit sexual activities occurring there. Reversing the New York Court

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to prevent spread of disease to apple orchards); *Slocum v. United States*, 515 F.2d 237 (5th Cir. 1975) (destruction of birds with communicable avian disease).

[2] *Mugler v. Kansas*, 123 U.S. 623 (1887) (closure of brewery); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (closure of livery stable); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962) (forbidding continued operation of existing sand and gravel mining operation even on the assumption that it "would confiscate the entire remaining utility of [the] properties").

of Appeals, the decision observed that "[t]he legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity." *Id.* at 707.[3] There was not the slightest hint that, upon the finding of a nuisance, the closure of the building for a one-year period even implicated the Takings Clause.

Just this past term the Court rejected a Fifth Amendment taking claim in which an innocent co-owner challenged the forfeiture of her interest in an automobile used in the commission of one act of prostitution. *Bennis v. Michigan*, ____U.S.____, 116 S.Ct. 994 (1996). The Court recognized that Michigan, by enacting the forfeiture law in question, had "sought to deter illegal activity that contributes to neighborhood deterioration and unsafe streets." 116 S.Ct. at 1001. The Court further observed that "[f]orfeiture of property prevents illegal uses 'both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.'" *Id.* at 1000 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416

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[3]Section 2320 of the New York Public Health Law provided in relevant part that:

> 2. The building, erection, or place, or the ground itself, in or upon which any lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining such nuisance, are hereby declared to be a nuisance and shall be enjoined and abated as hereafter provided.

Section 2329 provided further that:

> 1. If the existence of the nuisance be admitted or established in an action as provided in this article, or in a criminal proceeding in any court, an order of abatement shall be entered as part of the judgment in the case, which order...shall direct the effectual closing of the building, erection or place against its use for any purpose, and so keeping it closed for a period of one year...."

Arcara v. Cloud Books, Inc., 478 U.S. at 699-700.

U.S. 663, 687 (1974)). In the absence of any showing that the innocent co-owner had been deprived of due process in the forfeiture proceeding, there could be no taking claim. *Id.* at 1001.

The *Calero-Toledo* case involved the forfeiture under Puerto Rican law of a leased yacht on which Puerto Rican authorities had discovered marijuana. The decision expressly rejected the taking claim of the assertedly innocent owner, noting that the Puerto Rican statutes "further[ed]...punitive and deterrent purposes that have been found sufficient to uphold, against constitutional challenge, the application of other forfeiture statutes to the property of innocents." 416 U.S. at 686.

Temporary closure is much less drastic than forfeiture of ownership. This Court's decisions do not begin to suggest that respondent would have a viable taking claim based upon a temporary closure under such laws as the Florida statute in question here or the New York law in question in *Arcaro*. The closure of property found to be used as a site for repeated criminal activity prevents further illicit use and provides a strong incentive to property owners to ensure that their buildings do not become havens for drug dealing, prostitution, gambling or other criminal behavior that is properly regarded, at the very least, as a public nuisance subject to abatement. In the absence here of any claim at all of a denial of due process, the owner simply cannot contend that temporary closure effects a taking under the Fifth Amendment.

CONCLUSION

This Court should grant a writ of certiorari to District Court of Appeal and review its decision on the merits.

Respectfully Submitted,

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